Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20540

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	MM Docket No. 92-254
Concerning Section 312(a)(7)	)	
of the Communications Act	)	

To: The Commission

COMMENTS OF TURNER BROADCASTING SYSTEM, INC.

Bruce D. Sokler
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608
(202) 434-7300

Of Counsel:

Bertram W. Carp
Turner Broadcasting System, Inc.
810 First Street, N.E., Room 620
Washington D.C. 20002

January 22, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20540

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	MM Docket No. 92-254
Concerning Section 312(a)(7)	)	
of the Communications Act	)	

To: The Commission

COMMENTS OF TURNER BROADCASTING SYSTEM, INC.

Turner Broadcasting System, Inc. ("TBS"), licensee of WTBS-TV, Atlanta, Georgia, by its attorneys, submits its comments in response to the Request for Comments in the above-captioned proceeding.[1/]

During the recent election cycle, TBS found itself caught in the maelstrom created by the conflicting provisions of the Communications Act at issue in this proceeding. Broadcast licensees, like TBS, are obligated to provide federal political candidates[2/] with reasonable access to air, uncensored, political advertisements,[3/] but are prohibited from airing obscene

---

[1/]In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, MM Docket No. 92-254, FCC 92-486 (rel. Oct. 30, 1992) ("Request for Comments").

[2/]The statute technically requires access for "legally qualified candidates for federal office" the criteria for which are otherwise not germane here. See 47 C.F.R. § 73.1940.

[3/]47 U.S.C. § 312(a)(7) (requiring a broadcast licensee to provide federal candidates with reasonable access to station facilities for the purpose of airing political advertisements); 47 U.S.C. § 315(a) (barring a licensee from censoring a candidate's advertisement, or "use"). Failure to provide reasonable access carries with it the ultimate sanction for a broadcast licensee -- revocation of the station license. 47 U.S.C. § 312(a)(7).

or indecent programming.[4/] Because WTBS, among other stations, was asked to air political advertisements that contained arguably indecent abortion-related images,[5/] it faced the unacceptable choice of either denying reasonable access or airing the programming -- in possible violation of the Communications Act and/or the Criminal Code.

In its Request for Comments, the Commission unnecessarily questions the correctness of its Staff's tentative conclusion that a broadcast licensee should be permitted to make reasonable and good faith determinations regarding the indecency of an advertisement and to channel indecent advertisements.[6/] In fact, based on the language of the statute, prior Commission decisions, and the need to avoid disruption of broadcast operations, that conclusion is unavoidable.

The Commission's Staff has previously determined that, based on well-established canons of statutory construction and examination of the Congressional intent underlying the Act, a refusal to broadcast indecent political advertisements constitutes an exception to the

---

[4/]18 U.S.C. § 1464 (forbidding the broadcast of obscene or indecent programming under penalty of fine or imprisonment). Violation of Section 1464 is also grounds for revocation of the station's license. 47 U.S.C. § 312(a)(6).

[5/]The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." In the Matter of Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd. 2705 (1987); Pacifica Foundation, 56 FCC 2d 94, 97 (1975), aff'd sub nom. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[6/]Request for Comments at ¶ 2.

"reasonable access" and "no-censorship" provisions of the Act.[7/] Nothing has occurred in the years since that decision to undermine its correctness.[8/]

The Commission has also stated that, to avoid imposing prior restraints, it will not issue indecency determinations prior to the airing of an allegedly indecent program or advertisement.[9/] Given this consideration, a broadcast licensee must be given the flexibility to make a reasonable and good faith determination whether a political advertisement contains indecent material. To conclude otherwise would force broadcast licensees like WTBS to air arguably indecent programming, thereby risking criminal prosecution, fines, and license revocation; undermining the licensee's standing with its viewing audience; and potentially harming young viewers.

During the past election season, WTBS provided advertising to Daniel Becker, pursuant to his candidacy for Congress in the Ninth District of Georgia. At Mr. Becker's insistence, the advertisements were scheduled during Atlanta Braves telecasts -- programming especially likely to draw a substantial number of young viewers. Because of the uncertain status of abortion-related political programming, WTBS had no choice but to air the advertisements. Following the airing of those advertisements, the station received a large number of telephone calls and written correspondence, the vast majority of which were

---

[7/]Letter from Chairman Mark Fowler to Hon. Thomas A. Luken, dated Jan. 19, 1984.

[8/]Indeed, Congressional silence may be inferred as approval of the Staff's interpretation of the Act. See, e.g., CBS v. FCC, 453 U.S. 367, 385 (1981) (finding Congress's failure to repeal or revise Section 312(a)(7) "persuasive evidence" of Congressional approval of the FCC's interpretation).

[9/]See Letter to William J. Byrnes, Esq. (WBAI(FM)), 63 RR 2d 216 (1987) (Mass Media Bureau), rev. denied sub nom. Pacifica Foundation, Inc., FCC 87-215 (rel. June 16, 1987); Letter to Christian Action Network (rel. June 12, 1992) (Mass Media Bureau).

critical of the station. One can only imagine the response to even more explicit, and more obviously indecent, abortion-related political advertisements that other Atlanta stations quite understandably declined to air.

At the very least therefore, a broadcast licensee should not be forced to air obscene or indecent advertisements under the pain of losing its broadcast license. Moreover, the broadcast licensee should be permitted to exercise its judgment reasonably and in good faith and assess whether a particular advertisement contains indecent language or imagery. Judicial relief, to the extent it may be available, is hardly a long-term solution to the problem.[10/]

The flexibility to make reasonable and good faith indecency determinations and to channel advertisements found to be indecent carries with it little risk of abuse. While a station and the Commission may ultimately disagree in close cases, the indecency standard, and the Commission's prior application of it, provides sufficient guidance regarding the essential elements to a finding of indecency.[11/] Moreover, broadcast licensees are called upon to exercise reasonable and good faith judgements in other contexts.[12/] Finally, in the event a licensee abuses its discretion, it would be subject to sanction.

[10/]See Gillett Communications v. Becker, 1992 U.S. Dist. LEXIS 17266 (N.D. Ga. 1992).

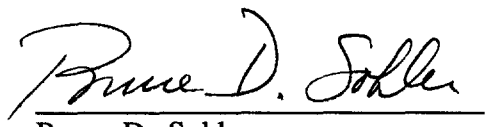
[11/]For example, a station would be able to justify its decision to channel an allegedly indecent advertisement based on language or images depicting or describing "sexual or excretory activities or organs." See In the Matter of Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd. at 2706.

[12/]For example, licensees must render reasonable and good faith judgments concerning the newsworthiness of events pursuant to the "equal opportunities" exemption. 47 U.S.C. § 315(a)(4); see In re King Broadcasting Co., 6 FCC Rcd 4998 (1991).

Conclusion

For the foregoing reasons, the Commission should permit broadcast licensees to make reasonable and good faith determinations regarding the indecency of a political advertisement and to channel indecent advertisements to time periods when children are less likely to be in the audience.

Respectfully submitted,



Bruce D. Sokler
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608
(202) 434-7300

Attorneys for Turner Broadcasting
System, Inc.

Of Counsel:

Bertram W. Carp
Turner Broadcasting System, Inc.
820 First Street, N.E., Room 620
Washington, D.C. 20002

January 22, 1993

D13193.2